

In The Matter of Merchant Mariner's Document No. Z-160917  
Issued to: JULIUS MITALY

DECISION AND FINAL ORDER OF THE COMMANDANT  
UNITED STATES COAST GUARD

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JULIUS MITALY

This appeal has been taken in accordance with Title 46 United States Code 239(g) and Title 46 Code of Federal Regulations Sec. 137.11-1

On 13 November, 1951, an Examiner of the United States Coast Guard at San Francisco, California, revoked Merchant Mariner's Document No. Z-160917 issued to Julius Mitaly upon finding him guilty of incompetence based upon a specification alleging in substance that "while holding a Merchant Mariner's Document as Chief Steward for merchant vessels of the United States, [you] are unfit to perform your duties under authority of your Merchant Mariner's Document by reason of physical and mental incompetence."

At the commencement of the hearing on 31 October, 1951, Appellant was given a full explanation of the nature of the proceedings, the rights to which he was entitled and the possible results of the hearing. Although advised of his right to be represented by an attorney of his own selection, Appellant voluntarily elected to waive that right and act as his own counsel. He entered a plea of "not guilty" to the charge and specification proffered against him.

Thereupon, the Investigation Officer made his opening statement and introduced in evidence the testimony of Dr. Walter C. Clowers, Senior Surgeon (Reserve), U. S. Public Health Service Hospital at San Francisco, California, who was the Chairman of a Medical Board which met on 1 September, 1950, and determined that Appellant was physically and mentally unfit for further sea duty. Dr. Clowers testified that the Medical Board considered Appellant's previous hospital record before arriving at its conclusion which was based upon the opinion that Appellant required psychiatric treatment to cure his mental and physical ailments. The Investigating Officer then rested his case.

The hearing was adjourned on 31 October, 1951, to permit a deposition to be taken at Appellant's request. The deposition of Dr. David H. Powelson, Director of the Psychiatric Clinic, Permanente Foundation Hospital, Oakland, California, was taken on 1 November, 1951. The hearing was reconvened on 8 November, 1951, and Appellant was represented by Nathan Jacobson, Port Agent of the Marine Cooks and Stewards Union of San Francisco. The deposition of Dr. Powelson was received in evidence. He stated that Appellant had submitted to a group of four psychological tests on 25 October, 1951, but that it could not be

affirmatively determined from the results of these tests that Appellant either could, or could not, "function on the job." Appellant also offered in evidence a copy of a Clinical Record of the USPHS Hospital, Baltimore, Maryland, dated 19 July, 1951.

At the conclusion of the hearing, having heard the arguments of the Investigating Officer and Appellant's counsel and given both parties an opportunity to submit proposed findings and conclusions, the Examiner announced his findings and concluded that the charge had been proved by proof of the specification. He entered the order revoking Appellant's Merchant Mariner's Document No. Z-160917 and all other licenses, certificates of service and documents issued to this Appellant by the United States Coast Guard or its predecessor authority.

From that order, this appeal has been taken, and it is urged that: Exception No. 1. The decision is based on the conclusions of the Medical Board of 1 September, 1950, to the effect that Appellant is physically and mentally unfit for sea duty. This disregards the testimony of Dr. Powelson to the effect that there were no findings in his examination of the Appellant which indicate he would not be able to function on the job. Also, Appellant has sailed, since the date of the Examiner's decision, with no physical or mental difficulties and he desires to furnish testimony as to his mental and physical capacity to perform his duties. The Examiner admitted there was no evidence of failure by Appellant to perform his duties and there have been no complaints on this basis other than absence to obtain medical care. Exception No. 2. The Examiner's adoption of the opinion of the Medical Board's psychiatrist (that Appellant's physical condition is due to a psychotic condition) gave no weight to the testimony of Dr. Powelson.

Exception No. 3. The findings that Appellant is unfit for sea duty in his usual capacities but is fit for shore duty in similar jobs are inconsistent and Appellant should be permitted to pursue the vocation of going to sea which he has followed for 29 years.

### OPINION

Proof of the specification is based almost entirely upon the opinion of the Medical Board of 1 September, 1950, that Appellant "is physically and mentally unfit for further sea duty and that his seaman's papers should be revoked." Although Dr. Clowers testified that the Board considered Appellant's prior record, his report as Chairman of the Board does not disclose any facts or diagnoses upon which this opinion was predicated. It is also noted that this Medical Board was convened at a time which was more than a year prior to the date of the hearing and, even at that time, Appellant was not under personal observation by the members of the Medical Board.

It is my opinion that the charge of incompetence has not been properly proven. Dr. Clowers testified as a qualified expert and since the subject matter is of such a technical nature that the proper conclusion to be drawn from the facts depends upon professional knowledge, his expert opinion would ordinarily bear considerable weight. Nevertheless, all of the facts upon which the action of the Medical Board was based should have been presented at the hearing in order to permit the Examiner to make the final determination, based upon all pertinent evidence, as to whether Appellant was qualified to sail on American merchant marine vessels in the capacities authorized

by his seaman's documents.

Under certain circumstances, a medical report as old as this one might be sufficient to prove the charge. But in this case, facilities were available to bring the report up to date at the time of the hearing; and Appellant specifically requested during the course of the hearing that he be "examined by some competent psychiatrist or group of psychiatrists or a group of doctors" (R. 17). Title 46 Code of Federal Regulations 137.05-5 was amended, effective as of 19 August, 1950, to provide for just such a situation as this. It reads, in part, as follows:

"(4). . . . In an action in which the physical or mental condition of a person is in controversy, an order on application may be issued by an examiner requiring such person to submit to a physical or mental examination by a physician. The order may be made only on motion for good cause shown and upon notice to the party to be examined and shall specify the time, place, manner, conditions and scope of the examination and the person by whom it is to be made. If the person fails or refuses to submit to such duly ordered examination, the claim shall be taken to be established for the purposes of the action."

In view of Appellant's request at the hearing for such an examination and the reiteration of this petition in his appeal, Appellant should have been given the opportunity afforded by the above regulation, unless the evidence of his incompetence was so conclusive that he could not have been prejudiced by the failure to comply with the regulation on this subject. I do not think there is any such evidence present in the record of this case.

#### ORDER

Therefore, the order of the Examiner dated 13 November, 1951, is VACATED, SET ASIDE and REVERSED. The charge and specification proffered against Appellant in this case are hereby DISMISSED.

Merlin O'Neill  
Vice Admiral, United States Coast Guard  
Commandant

Dated at Washington, D. C., this 12th day of May, 1952.